

Proposed Commission Regulations Regarding Ex Parte Communications

1. Delete Commission Regulation Section 11325 as follows:

~~—11325. Ex Parte Contacts.~~

~~—(a) After enforcement proceedings have commenced, Commission members and hearing officers shall avoid all contacts outside the hearing process with respondents, with Commission staff members, or with any other party or representative of a respondent or other interested party concerning either evidentiary matters or opinions regarding the existence or severity of an alleged violation or a proposed remedy.~~

~~—(b) When such contacts nevertheless occur outside of the hearing process, the Commissioner or hearing officer who made them shall identify the fact and substance of the contact for the record.~~

~~—(c) When such contacts result in a Commission member or hearing officer becoming so embroiled in the matter that he or she can no longer act fairly and impartially, that member shall either remove himself or herself from further consideration of the matter and shall refrain from voting or shall be subject to removal by a majority vote of either the full Commission or the committee if the Commission member is acting as a committee member.~~

2. Adopt Commission Regulation Sections 10280 through 10289 as follows:

10280. Purpose. Fairness and due process of law are essential elements of responsible government. Public confidence in government is highest when an agency conducts its adjudicatory business openly and impartially. This regulation supplements and helps explain minimum legal requirements concerning the disclosure of communications that occur outside of the normal hearing process and would therefore not be part of the administrative record when the Commission acts on permit applications and on enforcement cases and takes other adjudicatory actions. However, Commission members can, and are encouraged to, disclose more information relative to any communication that occurs outside of the public record to ensure that all Commission members can make informed decisions.

10281. Definition of an Ex Parte Communication. An ex parte communication is any oral or written communication between a member of the Commission and either any party to a pending Commission adjudicatory proceeding or an member of the public that does not occur in a Commission public hearing, Commission workshop, or other official Commission proceeding or on the official Commission record for the proceeding.

10282. Definitions of a Quasi-Judicial Proceeding and of a Quasi-Legislative Proceeding. All Commission actions are considered to be either adjudicatory or quasi-legislative. An adjudicatory action by the Commission affects specific rights or interests of an individual or business entity based on specific facts, such as the granting of a permit, the issuance of a cease and desist order, the issuance of a report to the California Energy Commission pursuant to California Government Code Section 66645(d), or Commission review of a federal consistency determination or certification. A quasi-legislative action generally applies to a given class or group of individuals or entities and usually takes the form of a Commission plan amendment, policy, or regulation.

10283. General Policy and Disclosure of Ex Parte Communications.

(a) Ex parte communications are prohibited in adjudicatory actions. However, if such a prohibited communication occurs, any Commission member who receives an ex parte communication concerning any adjudicatory matter pending before the Commission shall disclose the content of the communication on the record.

(b) The disclosure shall occur prior to or at the same time as the Commission considers the matter that is the subject of the ex parte communication.

(c) Compliance with this disclosure requirement regarding the receipt of an ex parte communication in written form shall be accomplished by sending a copy of the written communication and any response to the communication to the Commission Executive Director as soon as practicable.

(d) Compliance with this disclosure requirement regarding the receipt of an ex parte communication orally shall be accomplished by submitting a memorandum to the Executive Director for inclusion into the record of the matter that is the subject of the ex parte communication.

(e) The memorandum required by paragraph (d) shall include the substance of the communication, any response by the recipient Commission member, and the identity of each person from who the recipient Commission member received the communication.

(f) This policy shall not apply to quasi-legislative matters such as the adoption of or the amendment to a Commission plan, the adoption of or the amendment of a Commission regulation, and Commission comments on proposed or pending legislation.

10284. Permissible Ex Parte Communications. The following types of ex parte communications are not prohibited by these regulations and do not require any disclosure into the record:

(a) communications specifically authorized by statute and required for the disposition of an adjudicatory matter;

(b) the communication involves a matter of procedure or practice that is not in controversy;

(c) the communication is from an employee or representative of BCDC who has not served as an investigator, prosecutor, or advocate during the proceeding or pre-adjudicative state and whose purpose is to assist or advise the Commission;

(d) the communication is from an employee or representative of BCDC and concerns a settlement proposal advocated by the employee or representative; and

(e) the communication is from an employee or representative of BCDC and involves a non-prosecutorial proceeding.

10285. When the Policy Applies.

(a) The policy established by Section 10284 shall commence to apply for a permit application or a federal consistency determination or certification when an applicant first submits an application, a consistency determination, or a consistency certification to the Commission.

(b) The policy shall commence to apply for a Commission enforcement action when the Commission staff mails either a violation report or a complaint for the imposition of administrative civil penalties.

10286. Notification of Parties and Interested Persons.

(a) As soon as is practicable, the Executive Director shall notify in writing all parties to a proceeding and all persons interested in the proceeding that a Commissioner has received an impermissible ex parte communication.

(b) If the communication was received orally, the Executive Director shall include a copy of the memorandum required by Section 10283(c) and (d) with the written notification.

(c) If the communication was received in writing, the Executive Director shall include a copy of the written communication with the written notification.

(d) In either case, the notice shall also state that the party or person being notified must request an opportunity to address the Commission concerning the communication within 10 days of receiving the notice or the party or person shall waive the opportunity to address the Commission.

10287. Party Opportunity To Respond To an Ex Parte Communication. If a party requests an opportunity to address the Commission concerning the communication within 10 days as required by Section 10286, the Commission shall grant the request and may allow the requesting party to present rebuttal evidence concerning the subject of the ex parte communication.

10288. Ex Parte Communications After the Close of the Public Hearing and After the End of the Time Period for Receipt of Written Communications; Public Comments and Responses.

(a) If an oral ex parte communication occurs after the close of the public hearing or a written ex parte communication occurs after the deadline for submitting written comments, the ex parte communication shall be disclosed as required by Section 10283.

(b) The Commission Chair or the Commission may determine that the communication contains new or different information pertinent to the decision being made. The Commission Chair or the Commission may also determine that reopening the public hearing is therefore necessary to protect the integrity of the decision-making process.

(c) If the Commission chair or the Commission makes both such determinations, it shall circulate the communication to the entire Commission and may reopen the public hearing to allow the public sufficient opportunity to comment on and to rebut the information contained in the communication unless a legal deadline for voting prevents reopening the hearing.

(d) If necessary, either the deadline for Commission voting shall be extended or the Commission shall deny the application because of the public's inability to comment on the new or different information.

(e) If a conflict occurs between this section and Commission Regulation Section 10430, this section shall take precedence.

10289. Field Trips.

(a) A Commission member may take an individual field trip to the site of a proposed project or a pending enforcement action so long as the Commission member discloses the fact of the field trip and the substance of all that he or she observed to the Commission as soon as practicable afterwards.

(b) The Commission's policy on ex parte communications shall apply to any communication that involves a Commission member that occurs during a field trip either by an individual Commission member or by the Commission.